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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 2, 2007

CHIEF CLERKS OFFICE

2007 JUL - 2 PM 1:30

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: MARLIN ATLANTIS WHITE, LTD.
TCEQ DOCKET NO. 2006-1572-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, reading "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-1572-MWD

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IN THE MATTER OF THE
APPLICATION BY MARLIN
ATLANTIS WHITE, LTD. FOR
PROPOSED TPDES PERMIT
NO. WQ001457001

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BEFORE THE TEXAS CHIEF CLERKS OFFICE
COMMISSION ON
ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

**TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing and Requests for Reconsideration in the above-referenced matter and would respectfully show the following:

I. INTRODUCTION

Marlin Atlantis White, Ltd. (Marlin or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The proposed facility will be an activated sludge process plant operated in the complete mix aeration mode. Treatment units will include bar screens, aeration basins, final clarifiers, sludge digesters and chlorine contact chambers. The facility has not been constructed.

The wastewater treatment plant (WWTP) will serve a proposed 370-acre development located 2.1 miles east of State Highway 3 and 600 feet north of Farm-to-Market Road 517 in Galveston County. The draft permit would authorize the disposal of sludge at a TCEQ registered or permitted land application site, commercial land application site or co-disposal landfill.

The WTTP site will be located adjacent to Gum Bayou, approximately 2.14 miles east of State Highway 3 and 600 feet north of Farm-to-Market Road 517 in Galveston County. The treated effluent will be discharged to Gum Bayou; then to Dickinson Bayou Tidal in Segment No. 1103 of the San Jacinto-Brazos Coastal Basin. The unclassified receiving water uses are high aquatic life uses for Gum Bayou. The designated uses for Segment No. 1103 are high aquatic life uses and contact recreation.

Marlin submitted the application to the TCEQ on October 21, 2005 and the ED declared the application administratively complete on February 22, 2005. On February 24, 2005, the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was published in the *Houston Chronicle*. The Notice of Application and Preliminary Decision was published on July 27, 2005 in the *Houston Chronicle*. The TCEQ held a public meeting on October 6, 2005. Based on citizen concerns regarding the adequacy of the meeting notice, the comment period was extended to December 2, 2005. On February 2, 2007, additional notices were sent to upstream landowners. The comment period finally closed on March 5, 2007.

In response to the various notices, the TCEQ received several requests for hearing and reconsideration of the ED's decision. OPIC recommends granting the hearing requests submitted by Betty Gutierrez and Bert Schroeder. In addition, as described *infra*, OPIC recommends provisionally granting the hearing request submitted by Mayor Julie Masters. OPIC further recommends denying the requests for reconsideration.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requests for Contested Case Hearing

This application was declared administratively complete on February 22, 2005.

Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health & Safety Code § 382.056 and Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the

- activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

B. Request for Reconsideration

House Bill 801 created a procedural mechanism, the Request for Reconsideration, that allows for the Commission's review of the Executive Director's decision on an application. A person may file a request for reconsideration, contested case hearing or both no later than 30 days after the chief clerk's transmittal of the Executive Director's decision and Response to Comments. TEXAS WATER CODE § 5.556; 30 TAC § 55.201(a) and (e).

Any person may file a Request for Reconsideration of the Executive Director's Decision. 30 TAC § 55.201(e). The Request for Reconsideration must state the reasons why the decision should be reconsidered. 30 TAC § 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

III. DISCUSSION

The TCEQ received the following individual requests for a contested case hearing: Veta Winick, Mayor of Dickinson (dated March 24, 2005); Julie Masters, Mayor of Dickinson (dated August 1, 2005); Chat Magee; Rena Hardage; Ray & Sherry Jones; Bertram C. Schroeder III, Co-Trustee, B.C. Schroeder Jr., Marital Trust; and Peggy Wright, Spokesperson for Tropical Gardens Citizens and the Senior Citizens Group of Tropical Gardens. In addition, the TCEQ received identical copies of a hearing request (Group Hearing Request) with letterhead "Sr. Citizens Tropical Gardens, Bridget Long" from the following: Carl and Tom Bennett; Kelly Brautigam; L.L. Coots; Carol & Tom Dayton; Mr. & Mrs. Matthew Dayton; Mason Evans; Diane Garcia; Lynn M. Garcia; Carl R. Griffith; Betty Gutierrez; Bobby Hagan; Art & Jane Levicki; Bridget E. Long; Dawn C. Pajak; Janice M. & John C. Patterson; and Louis Starz. OPIC also received identical copies of a request for reconsideration (Group Request for Reconsideration) from the following: James D. Albert; John Berry; Mark P. Bowers; Damon & Nicole Brown; Van Bush; Zeph Capo; Roland Cardon; Wade Duphily; Fred Eagle; James Ettell; Lynn M. Garcia; Kay Gonzales; Betty Gutierrez; Elizabeth Hagan; Pham Huyah; Ray & Sherry Jones; Lisa, Richard & Scott Kellogg; Bridget E. & Dudley Long; Lorna & Robert Malone; Diane Mettlach; Bill and Cyndi W. Mulvany; Matthew Muns; Daniel & Linda Oakes; Dawn C.

Pajak; Janice M. & John C. Patterson; Ha Pham; Nancy Priddy; Young Reese; Sam & Starla Reichel; Danny L. Rodgers; Alison & Alton Rouse; Pedro Sanchez; Louis Starz; Wanda J. Toole; Francisco Villonueva; Tomas Villanueva; Amber Whitted; Pamela Williams; and Edwin G. & Peggy Wright. In addition, the TCEQ received identical requests for reconsideration¹ from City of Dickinson Councilmen Louis Decker, William King III and Charles Suderman as well as Councilwoman Mary Dunbaugh. Finally, the contested case hearing request from Mr. Schroeder also included a request for reconsideration.

A. Determination of Affected Person Status

1. Group Hearing Request

The Group Hearing Request states that senior citizens of Tropical Gardens in Dickinson are concerned because Gum Bayou is a brackish bayou and that adding wastewater to a small bayou will kill the crabs, shrimps and fish as well as hurt the wildlife. The request also states that human consumption from bayou catches would be harmful. They are concerned that human waste already exists in Gum Bayou and Dickinson Bayou, and adding more will exacerbate the problem. They state that on nine occasions, neighbors who walked or fell into the bayous have reported cases of infections. They are also concerned that the package plant will not be manned at all times. This could cause irreparable damage in the event of a spill. They also claim there are many existing plants that could take be used instead of building a new wastewater treatment plant. Finally, the Group states that the Applicant is relying on old data to support the proposed

¹ OPIC notes that these letters also encourage the Commission to grant the hearing requests submitted by residents of the Tropical Gardens subdivision; however, these City Council members are personally requesting reconsideration of the Executive Director's decision. Therefore, for purposes of this analysis, these letters will be addressed only in the section regarding reconsideration of the Executive Director's decision.

permit.

No one who submitted a group hearing request describes where they live in relationship to the plant. OPIC reviewed the affected landowners list in the TCEQ Office of Chief Clerk's file to identify any person on that list who submitted a Group Hearing Request. Only Betty Gutierrez is on the affected landowners list; therefore, at this time, OPIC can recommend that Betty Gutierrez is an affected person entitled to a contested case hearing. She has identified interests protected by the law under which this application will be considered. A reasonable relationship exists between the interests claimed and the activity regulated. The regulated activity will likely impact the health, use and property of the person as well as the use of a natural resource of the person. OPIC recommends a finding that Ms. Gutierrez is an affected person entitled to a contested case hearing.

With respect to the other members of the group, OPIC cannot determine to what degree they will be affected by the issuance of this permit and cannot conclude with certainty they would be affected persons. However, if they submit additional information, particularly information that describes their proximity to the facility, OPIC will reconsider its recommendation.

2. Mayors Veta Winick and Julie Masters

Former Mayor Veta Winick states that Dickinson residents paid an extremely high cost for a recently renovated public sewer plant that has to meet water quality discharge limits that are significantly lower than what is proposed for this application. She further states that this bayou is on the State's impaired water body § 303d list. She also requests that notices be sent to those who own property both upstream and downstream. Current Mayor Julie Masters echoes her

predecessor's concerns regarding notice and adds that the legal notice should have been printed in a different newspaper.

OPIC appreciates the concerns expressed by the mayors. However, it is not clear that the either mayor is entitled to be deemed an affected person based on their elected status. It appears they are requesting a hearing in their official capacities, but it is not clear if they are acting on behalf of the council or as an individual member of the council. OPIC will presume that Mayor Masters is authorized to request a hearing on behalf of the city and council and recommend the request be granted. However, we request the Mayor provide clarification in a reply to this Response to confirm her request is supported by council action.

3. Chat Magee

Mr. Magee requests a hearing and asks to be added to the mailing list. He has not described where he lives with respect to the facility (he is not on the affected landowners list), nor does he identify any issues that concern him about this application. OPIC concludes that Mr. Magee is not an affected person.

4. Rena Hardage

Rena Hardage opposes the discharge limits and does not feel the notice was published in an appropriate newspaper. She does not describe how she would be affected by this permit (she is not on the affected landowners list). OPIC cannot conclude Ms. Hardage is an affected person.

5. Sherry and Ray Jones

The Jones state that several times per year, they experience tidal waves that flood their property. They contend that the waters of Gum and Dickinson Bayous have abundant marsh

land, estuaries and numerous wading birds and other wildlife that would be negatively impacted by the discharge.

The Jones do not describe how they would be personally impacted by this permit (they are not on the affected landowners list). OPIC cannot conclude the Jones are affected persons.

6. Peggy Wright

Ms. Wright states she is writing on behalf of the citizens of Tropical Gardens and the Tropical Gardens Senior Citizens Group. She states the ED used inaccurate data for modeling used to assess Gum Bayou's ability to be a viable receiving body of water for the discharge of treated effluent. Gum Bayou and this section of Dickinson Bayou are considered impaired with respect to fecal coliform concentrations which causes nonsupport of contact recreation use.

If Ms. Wright is speaking on her own behalf, she has not described how she would be personally impacted by this permit (she is not on the affected landowners list). If she is seeking a hearing on behalf of either of the associations she purports to represent, she has not identified a member of either organization who would otherwise have standing to request a contested case hearing. 30 TAC § 55.23(a)(1). At this time, OPIC cannot recommend that Ms. Wright or either of her associations are affected persons. If she provides additional information about herself personally or members of her associations who would have standing to request a contested case hearing, OPIC will reconsider its recommendation.

6. Bert Schroeder

Mr. Schroeder owns property west of Gum Bayou from FM-517 north and directly across from the proposed point of discharge into Gum Bayou. Segment 1103D of Gum Bayou is

classified 5a and appears in the TCEQ's 2004 list of 303(d) streams submitted to the US Environmental Protection Agency dated May 13, 2005. That report shows the water body location as "from the confluence with Dickinson Bayou to FM 3436 in Galveston County." Mr. Schroeder states that is factually incorrect, as Gum Bayou does not cross FM 3436. He also disputes ED Response to Comments Nos.: 15, 19 & 35 regarding modeling; 28 regarding point of discharge; 7 regarding WWTP's superior treatment of raw sewage; 14 regarding a TMDL study; and 12 regarding regionalization. These issues will be discussed in the next section.

OPIC concludes that based on the relationship between his property and the discharge point, Mr. Schroeder is an affected person entitled to a contested case hearing. He has identified interests protected by the law under which this application will be considered. A reasonable relationship exists between the interests claimed and the activity regulated. The regulated activity will likely impact the health, use and property of the person as well as the use of a natural resource of the person. OPIC recommends a finding that Mr. Schroeder is an affected person entitled to a contested case hearing.

B. Issues Raised in the Hearing Requests

Mr. Schroeder, Ms. Gutierrez and Mayor Masters have raised the following issues: whether a study has been conducted to compare the impacts of individual septic tanks and a wastewater treatment plant on the bayous with respect to both day-to-day operation and an upset; whether regionalization would be a better solution; whether a TMDL study on Dickinson Bayou should be completed before this permit is issued; whether an accurate study of bayou depth, volume and flow should be conducted; whether the dissolved oxygen modeling was accurate;

whether Gum Bayou is deep enough to handle the proposed wastewater discharge; whether the dimensions used to model Gum Bayou were accurate; whether the proposed discharge is protective of the fish, plants and wildlife; whether it will be harmful to eat fish from the bayou or for people to walk in the area; and whether the Applicant will be able to respond in an emergency situation.

1. Issues Disputed

All of the issues remain disputed. With respect to the requested studies (septic tanks and TMDL), the ED states that the law does not require such studies in order to determine whether the discharge permit should be granted. The ED states that according to Marlin's application, none of the three WWTPs in the area have the capacity to accept the volume of wastewater proposed by Marlin. For all issues related to modeling (an accurate study of depth, volume and flow, accuracy of dissolved oxygen modeling, and the dimensions of Gum Bayou), the ED acknowledges that the dimensions provided for Gum Bayou in the application do not represent normal water level conditions and modeling criteria was developed using water body width dimensions measured from aerial photographs. With respect to safety issues (aquatic life, human consumption of fish), the ED states that if Marlin operates and maintains the facility according to TCEQ rules and requirements in the draft permit, the ED expects the draft permit to be protective of aquatic life and human health in accordance with Texas Surface Water Quality Standards. Finally, with respect to emergency situations, the ED points out that a licensed operator must be available by page or phone seven days per week; however, the rules do not stipulate the operator must be on site at all times.

2. Issues of Fact

Whether the modeling was conducted properly is a question of fact appropriate for referral to the State Office of Administrative Hearings (SOAH). Whether the permit is protective of aquatic life and human health is an appropriate question of fact appropriate for referral to SOAH. Whether the WWTP is consistent with TCEQ's regionalization rules is a question of fact appropriate for referral to SOAH. The remaining issues (additional studies, emergency issues) are not appropriate questions of fact to be referred to SOAH as discussed below.

3. Issues Raised During the Comment Period

Questions regarding modeling, protection of human health and aquatic life, regionalization, additional studies, and emergency measures were all raised in a timely manner during the comment period.

4. Relevant and Material Issues

The hearing requests raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Concerns regarding whether modeling was conducted correctly are relevant and material to the Commission decision because the modeling results are a determining factor as to whether the permit is in compliance with Texas Surface Water Quality Standards. Similarly, regionalization is an issue relevant and material to the Commission decision because under, Tex. Water Code § 26.081, the TCEQ is mandated to encourage and promote the development and use of regional and area-wide waste collection, treatment and disposal systems to serve the waste disposal need of the citizens of the State. Also, whether the proposed permit will protect aquatic life and human health in

accordance with Texas Surface Water Quality Standards is an issue relevant and material to the Commission decision.

However, OPIC concludes that the additional studies requested and the presence of an operator at the site at all times are not issues relevant and material to the Commission decision. The rules do not require septic tank studies or TMDL studies in order to determine whether this permit should be issued. Also, the rules do not require an operator to be at the plant at all times.

5. Issues Recommended for Referral to Hearing

In light of the requirements of 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(I), OPIC recommends that the Commission refer the following disputed issues of fact to SOAH:

1. Was the modeling in the evaluation of the proposed permit conducted accurately?
2. Is the granting of this permit consistent with regionalization?
3. Is the proposed permit protective of aquatic life and human health?

C. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires that any commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. REQUEST FOR RECONSIDERATION

Several people sent in an identical form letter requesting reconsideration of the Executive Director's decision. These letters address the issues regarding the modeling criteria set out above. The letters from the members of the city council, although not identical in form to the above-referenced letter, raised the same issues. In addition, Mr. Schroeder indicated in his letter requesting a contested case hearing that he was also requesting reconsideration of the ED's decision.

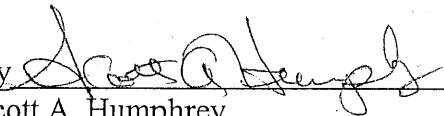
The modeling issues are relevant, and OPIC is requesting those issues be referred for a contested case hearing. However, in the absence of an evidentiary record, OPIC cannot recommend reconsideration of the ED's decision.

IV. CONCLUSION

OPIC recommends granting the hearing requests submitted by Betty Gutierrez and Bert Schroeder and referring this matter to SOAH with the above-referenced issues. We also recommend granting the request of Mayor Masters subject to her providing information that she is acting on the direction of the City Council. OPIC further recommends denying the requests for reconsideration of the Executive Director's decision.

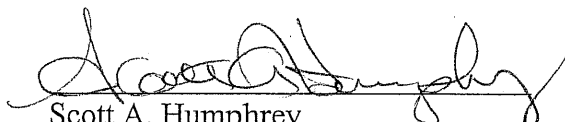
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007 the original and eleven true and correct copies of the Office of the Public Counsel's Response to the Requests for Hearing and Requests for Reconsideration were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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